NO. 547

In the Supreme Court of the United States

October 1932 Term

WALTER H. GANT, KNOX L. GARVIN,
and A. D. HUDSPETH,
Appellants,

vs.

CITY OF OKLAHOMA CITY, a Municipal Corporation,
and J. W. VANMETER,
Appellees.

STATEMENT SHOWING JURISDICTION OF SUPREME COURT TO REVIEW DECISION OF THE SUPREME COURT OF OKLAHOMA.

Come now the appellants and in compliance with Rule 12 of the Supreme Court of the United States, state and show that this Honorable Court has jurisdiction to review the decision of the Supreme Court of the State of Oklahoma on the following grounds, to-wit:

A. This court has jurisdiction to review the decision of the highest court of the State of Oklahoma, to-wit: the Supreme Court of that state, pursuant to Section 237 of the Act of Congress of February 13, 1925, entitled:

> "An Act to Amend the Judicial Code, and to further define the jurisdiction of the Circuit Courts of Appeals and of the Supreme Court, and for other purposes,"

which section reads as follows, to-wit:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constituion, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."
>
> Judicial Code, Section 237, as amended; 43 Stat. 937; 28 U. S. C. A., Section 344.

B. The judgment of the Supreme Court of the State of Oklahoma herein complained of was rendered, affirming the judgment of the trial court, on June 21, 1932. The order and judgment denying a petition for rehearing and making said judgment final, was rendered by the Supreme Court of said State on November 1st, 1932. The same appear at pages 172 and 176 of the record.

The application and petition for appeal was presented to the Supreme Court of the State of Oklahoma and allowed on Nov. 9th, 1932. The same appear at pages 176 to 179 of the record.

C. The nature of the case is as follows, to-wit:

Appellants claim and aver that that part of the Zoning Ordinance of the City of Oklahoma City, known as Ordinance No. 3944, (Record page 135) is unreasonable, discriminatory, unconstitutional and void as applied to the property of the appellants, and the facts as shown in the record. The same being violative of the Fourteenth Amendment of the Constitution of the United States, and is and was, in its operation, the taking of property without due process of law, a denial of the equal protection of the laws, and the enforcement thereof as against the property of the appellants and deprive them of their property and the use thereof for lawful purposes contrary to the Constitution of the United States, and that the city had no statutory authority to enact and enforce the same, which section of said ordinance reads as follows, to-wit:

> "No permit for the drilling or putting down of any petroleum or natural gas well shall be issued to any person, firm or corporation, and no well for which permit has been heretofore issued, shall be drilled into any producing oil or gas horizon, until there shall be filed with the City Clerk of the City of Oklahoma City a good and sufficient bond covering each well for which permit is applied, and executed by some bonding or indemnity company authorized to do business in the State of Oklahoma, running in the name of Oklahoma City and conditioned that the applicant will pay and discharge any liability imposed by law for damages on account of injury to property, either private or public, or bodily injury, including death,

received or suffered by any person or persons, firm or corporation, and resulting from the drilling, operation or maintenance of any well or any structures, equipment, machinery, tanks, pipelines or appurtenances thereto, and will abide by and comply with all the provisions of this ordinance; said bond shall be approved by the City Council. The maximum total liability, under said bond, for loss or damage either to person or property shall be $200,000.00. Such bond shall be made for a period of not less than one year, and a new bond shall be furnished at the expiration of any existing one, if the operation of such well covered thereby is continued. If at the time of such renewal all drilling on such well has been completed, the amount of total liability, under such bond, may be reduced to $50,000.00. In case any bond required herein shall lapse or become void for any reason whatsoever, the permit issued under the terms of this ordinance shall immediately become inoperative and void until a new bond shall be provided and filed with the City Clerk or the existing bond reinstated in full force, and such well shall be shut down and all operations and production thereof suspended and discontinued until the filing of such new bond or reinstatement of such existing bond; said renewal bond shall be approved by the City Council. The provisions of this section shall apply to all wells although permits have been previously issued therefor."

(Record page 144).

This ordinance was passed and enforced pursuant to Chapter 178, Session Laws of Oklahoma, 1923, entitled:

"An Act relating to the powers of cities, with respect to buildings, sites, areas, trades and industries; authorizing the creation of zoning districts, and declaring an emergency."

Section 1 of said statute reads as follows, to-wit:

> "Section 1. For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes."

Section 21 of Ordinance 3944 appears at pages 135 to 141 of the record.

The ruling of the trial court was that the ordinance and statute pursuant to which the ordinance was passed, were valid and constitutional and the ruling and decision of the Supreme Court of the State were that the ordinance and statute pursuant to which the ordinance was passed and enforced, were both constitutional and valid, and that the same did not violate any constitutional rights of the appellants guaranteed to them by the Fourteenth Amendment of the Constitution of the United States and was not unreasonable in terms or in its operation. In other words, the validity of the statute and ordinance were sustained by both the District Court of the State and the Supreme Court of the State. It is claimed that this court has jurisdiction to review the decision and ruling of the Supreme Court of the State, being the highest court of the State of Oklahoma, in its holding that the provision of the ordinance com-

plained of the statute of the state, pursuant to which the ordinance was passed and enforced were constitutional and valid and did not interfere with the property or personal rights of the appellants.

And to review said Judgment which granted a permanent injunction against appellants from using their said property for said lawful purpose, without first meeting the said void and unconstitutional requirements of said ordinance.

The decision of the Supreme Court of Oklahoma now appealed from, to wit:

> *Walter H. Gant et al* v. *The City of Oklahoma City*, 15 Pac. (2d) 833. (Record 172). Is not yet officially reported.

It is claimed that this statute and ordinance violate the rights of the appellants as guaranteed by the following provision of the Constitution of the United States as follows, to-wit:

> "Section 1, Article 14 of the Constitution of the United States, among other things, provides:
>
> " 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

D. The following authorities are believed to sustain the jurisdiction of the Supreme Court of the United States

to review the decision of the Supreme Court of Oklahoma involving this constitutional question, namely:

Dobbins v. *Los Angeles*, 25 Sup. Ct. Rep. 18, 195 U. S. 223, 47 L. ed. 119.

Lawton v. *Steele*, 152 U. S. 133-137, 38 L. ed. 385-388, 14 Sup. Ct. Rep. 499-501.

Yick Wo v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

Reagan v. *Trust Co.* 154 U. S. 362, 397, 399, 410, 412, 14 Sup. Ct. Rep. 1047.

Holden v. *Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

Pennsylvania Coal Co. v. *Mahon et al.*, 43 Sup. Ct. Rep. 158, 260 U. S. 393, 67 L. ed. 322.

Nectow v. *City of Cambridge et al.*, 277 U. S. 183, 72 L. ed. 842, 48 Sup. Ct. Rep. 447.

Village of Euclid v. *Ambler Realty Co.*, 272 U. S. 365, 47 Sup. Ct. 114, 71 L. ed. 303, 54 A. L. R. 1016.

State of Washington ex rel., Seattle Trust Company v. *Roberge*, 278 U. S. 116, 73 L. ed. 210.

In the case previously before this court between the same parties the appeal was dismissed for want of Jurisdiction because only a temporary injunction had been granted *Gant et al* v. *City*, 76 L. ed. 266, No. 449, October 1931 term. However in the present appeal a permanent injunction, which is a final Judgment, was granted.

Wherefore, it is respectfully submitted that this court has jurisdiction of this appeal in that it involves a single

question, to-wit the constitutionality of the statute and ordinance of the State of Oklahoma, the same having been held valid and sustained in a final decision by the highest court of that state.

Respectfully submitted,

JAMES S. TWYFORD,
Oklahoma City, Oklahoma,

SOLON W. SMITH,
Oklahoma City, Oklahoma,

ALLEN K. SWANN,
Tulsa, Oklahoma,

R. B. BROWN,
Duncan, Oklahoma,

C. D. CUND,
Duncan, Oklahoma,

J. H. EVEREST,
Oklahoma City, Oklahoma.
Attorneys for Appellants.

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Appellants,

vs.

CITY OF OKLAHOMA CITY, a Municipal Corporation
and J. W. VANMETER,
Appellees.

BRIEF OF APPELLANTS

Appellants claim that that part of the Zoning Ordinance of the City of Oklahoma City, known as Ordinance No. 3944, is unreasonable, discriminatory, unconstitutional and void as applied to the property of the appellants, and the facts as shown in the record. The same being violative of the Fourteenth Amendment to the Constitution of the United States, and is in its operation, the taking of property without due process of law, a denial of the equal protection of the laws, and the enforcement thereof as against the property of the appellants and deprives them of their property and the use thereof, for lawful purposes, con-

trary to the Constitution of the United States, and that the City had no statutory authority to enact and enforce the same, which section of said ordinance reads as follows, to-wit:

> "No permit for the drilling or putting down of any petroleum or natural gas well shall be issued to any person, firm or corporation, and no well for which permit has been heretofore issued, shall be drilled into any producing oil or gas horizon, until there shall be filed with the City Clerk of the City of Oklahoma City a good and sufficient bond covering each well for which permit is applied, and executed by some bonding or indemnity company authorized to do business in the State of Oklahoma, running in the name of Oklahoma City and conditioned that the applicant will pay and discharge any liability imposed by law for damages on account of injury to property, either private or public, or bodily injury, including death, received or suffered by any person or persons, firm or corporation, and resulting from the drilling, operation or maintenance of any well or any structures, equipment, machinery tanks, pipelines or appurtenances thereto, and will abide by and comply with all the provisions of this ordinance; said bond shall be approved by the City Council. The maximum total liability, under said bond, for loss or damage either to person or property shall be $200,000.00. Such bond shall be made for a period of not less than one year, and a new bond shall be furnished at the expiration of an existing one, if the operation of such well covered thereby is continued. If at the time of such renewal all drilling on such well has been completed, the amount of total liability, under such may be reduced to $50,000.00. In the case any bond required herein shall lapse or become void for any reason whatsoever, the permit issued under the terms of this

ordinance shall immediately become inoperative and void until a new bond shall be provided and filed with the City Clerk or the existing bond reinstated in full force, and such well shall be shut down and all operations and production thereof suspended and discontinued until the filing of such new bond or reinstatement of such existing bond; said renewal bond shall be approved by the City Council. The provisions of this section shall apply to all wells although permits have been previously issued therefor."

This action was instituted in the District Court of Oklahoma County, Oklahoma, on the 2nd day of October, 1930, by the appellants, against the appellees, the City of Oklahoma City, Oklahoma, a municipal corporation, and J. W. VanMeter. The object of the appellants in filing the suit was to enjoin the city from interfering with the appellants in the drilling of a well for oil and/or gas on block number nine (9), Meads Addition to Oklahoma City, Oklahoma.

ABSTRACT OF PLEADINGS

The appellants' petition sets forth that appellants are the owners of a valid oil and gas mining lease on block 9, Meads Addition to Oklahoma City, Oklahoma; that said lease provided, among other things, that the lessee named therein should commence the drilling of a well upon said premises for oil and/or gas within a certain length of time, and that the time within which said well was to be

commenced had not expired. Appellants further allege that in order to carry out the terms of said lease they had entered into a contract with one M. T. Smith, a drilling contractor, to go upon said premises and drill a well for oil and/or gas, and that pursuant to said contract said drilling contractor had proceeded to move machinery and equipment upon said premises and had commenced the drilling of a well thereon, which, at the time of the filing of said petition, had been drilled to a depth of 2,700 feet.

Appellants further alleged that before entering upon said premises by their said contractor for the purpose of drilling said well they had complied with all the valid ordinances of the appellee, city, regulating the exploration of said premises for oil and gas, and had complied with all the valid rules, regulations and ordinances of said appellee, city, prerequisite to the procuring of a permit from said appellee for the drilling of said well, and that the board of adjustment of said appellee had entered its order granting the said appellants a permit to drill said well. Appellants further alleged that said appellees were threatening to interfere with appellants and appellants' contractor in the drilling of said well by wrongfully requiring the appellants to execute and file with the appellees a bond in the penal sum of $200,000 signed by some surety company as surety, payable to said appellee, city, conditioned as provided by the said ordinances of said city. Appellants al-

leged that said requirements of said bond is based upon oppresssive, unreasonable, unconstitutional and void ordinances. Appellants further alleged that the property upon which they were drilling said well was far removed from residences, homes, or buildings, and that said property had been used for a period of more than twenty years as a city dump ground, and that there were wells drilled and being drilled in close proximity to said property, which, when completed as producers of oil and/or gas would drain appellants' property of the oil and gas underlying the same. Appellants further alleged that they acquired their interest in said property prior to the time that said appellees attempted to adopt such oppressive, unreasonable and void ordinances. Appellants alleged that the demand of said city for such bond was unreasonable and unconstitutional, and if enforced would have the effect of depriving these appellants of valid property rights without due process of law; that surety companies authorized to transact business within the State of Oklahoma, before they would execute such a bond for these appellants, would make certain demands with which the appellants were unable to comply.

Appellants further alleged that they offered to make and were at said time ready, willing and able to make and file with said appellee, city, a bond conditioned as required by said ordinances with good and sufficient per-

sonal sureties thereon, but that said appellee refused to accept such a bond.

Appellants further alleged that said appellees unless enjoined and restrained, would forcibly stop said appellants and their contractors from drilling said well, for which action said appellants would have no adequate remedy at law. The appellants prayed for a temporary restraining order and a temporary injunction, and that upon final hearing thereof, said injunction be made permanent.

By way of cross-petition the appellees alleged that the appellants made an application through the buliding commissioner for a permit to drill a well upon the premises involved herein, and that such application was denied, and that appeal was prosecuted by appellants to the board of adjustment of Oklahoma City, Oklahoma, that said appeal was heard September 15th., and an order entered by the board of adjustment granting to the appellants the right to obtain a permit for the drilling of said well provided that the appellants should comply with all ordinances and regulations of said city then in force or thereafter put in force relative to drilling, operating and maintaining a well upon said property, attaching to their answer a copy of the order of the board of adjustments.

Appellees further state that after the granting of said order the appellants went upon said property without ob-

taining a permit and without complying with the ordinances of the city, as hereinafter set out, and commenced the drilling of a well. The appellees alleged that the appellants failed to execute a bond in the sum of $200,000, as required by the city ordinances, conditioned that the appellants would pay and discharge any liability imposed by law for damages on account of injury to property, either public or private, or bodily injury, including death, received or suffered by any person or persons, firm or corporation, resulting from the drilling, operation or maintenance of said well. Appellees pray that the court restrain the appellants, their servants, agents and employees, from drilling or continuing the drilling of said well upon said property until said appellants have complied with the ordinances of said city and obtained the permit and executed the bond as required by said ordinances, and that upon a final hearing the temporary order be made permanent.

ABSTRACT OF EVIDENCE

The appellants called as their first witness, James Lemen. He testified that he was a civil engineer by profession; that he had visited block 9, Meads Addition to Oklahoma City, Oklahoma; had surveyed the same and made a plat thereof, and that the location of the well thereon was approximately one-half mile from the nearest

business building, and that the house to the location was approximately 100 yards closer than this; the nearest building he found was a railroad building about three hundred yards from the site; that the river was south from the well, and between the well and the river was waste land that had been used for a dump ground. He testified that north of the well and about seven hundred and fifty feet from it was a railroad track, and in an easterly direction up the track, perhaps one hundred yards, was a water tank, and that west of the well there were no residences or habitation closer than half a mile, and that between the well and residences, west of it was waste land and dump grounds. He identified the plat which appears at page 43 of the case-made. He testified that the Mead well was all of a mile from the City Hall in Oklahoma City, and that between the well and the City Hall on an air line was a considerable business district.

CHARLES K. SCRUGGS testified that he was in the insurance and bond business, representing the Detroit Fidelity & Insurance Company, and the Metropolitan Casualty Insurance Company; that he was familiar with the $200,000 bonds required by the city, and that his company was authorized to do business within the State of Oklahoma, and could execute such a bond as sureties if they desired to do so, but before they would execute such a bond for an independent contractor, they would require the independent

contractor to deposit with the surety company cash or collateral to the full amount of the bond, or require such a financial statement that the company would be amply protected, and that the financial statement would have to show a net worth in the applicant of the bond of at least a million dollars (Printed Record Page 35); that all surety companies operating in this state made practically the same requirements before they would execute such a bond.

A. D. HUDSPETH testified that he was familiar with block 9 where the well in question was being drilled, and that there was a well producing 610 feet southeast of the well in question, purported to be making at least 86,000 barrels of oil per day, and that it belonged to T .B. Slick, and caused no trouble when it was drilled in; that the Skelly-Hurt well was 800 feet south and 100 feet east of the location in question and was reported to be making at least 80,000 barrels of oil per day, and that the city owns the property immediately south of the block 9 location and across Reno Avenue from it, and that there are three locations on the city property. That the location in block 9 is right in the middle of the dump grounds, and that in order to make said location he had to hire three different crews to clean the garbage and refuse from said tract (Printed Record, Page 40); that he was a practical engineer and was familiar with machinery and equipment used in the Oklahoma City field, and that there was no hazard and

would be no hazard in bringing in a well on said block. He testified on cross-examination that sand, if the wells were permitted to stand open long enough, would cut out the threads, but that there were always two gates on the well and that either one of them could be closed; that the modern equipment and appliances were not used on the Mary Sudik and Sigmon wells which got beyond control. (Printed Record, Page 46).

KNOX GARVIN testified that he was one of the appellants and knew where the present location was; that there were no residences in a quarter of a mile of it, but that there was a dump ground northwest, south and southwest of it, and immediately east and southeast there is the oil field outside the city limits; that he had been engaged in the oil business for twelve or fifteen years and had had considerable experience in drilling wells; that there was no hazard in completing one of these wells in the Oklahoma City field where the proper equipment was used. (Printed Record, Page 47.) He explained then to the court the equipment that should be used in completing one of these wells. (Printed Record, Page 49).

He testified that he learned that before they would be able to make a $200,000 surety bond that he would have to put up collateral surety with the company signing the bond as surety the amount of $250,000. (Printed Record, Page 53). That the surety companies charge a pre-

mium of $2,000 a year for each bond; that he wanted to make a personal bond, but was informed that the city could not accept it (Printed Record, Page 53); that the city charged a fee of $1,000 for a permit; that a certified check for this amount had been deposited with the city (Printed Record, Page 54).

WALTER GANT testified that he was one of the appellants and lived in Oklahoma City and was familiar with the Oklahoma City oil field; that he had been in the oil business since 1914; that he had assisted in drilling about 39 wells in the Oklahoma City field; that he was familiar with the location of the well in question, and that there was no more hazard connected with the drilling and completion of this well than there would be in the drilling of any other oil well; that he had never experienced any trouble with the drilling in of any of the wells in the Oklahoma City field, and that none of them had done any damage; that he and Mr. Garvin carried compensation insurance as well as public liability insurance; that they had applied for a permit to drill this well and had put up the $1,000 fee, and had complied with all the requirements of the city prerequisite to securing the permit except the giving of the $200,000 bond.

OTTO BRADFORD testified that he was general umpire of the Oklahoma City field, having supervision of the drilling in, opening and shutting in of the wells and had been such

ever since the commencement of the Oklahoma City field; that he knew where the location on block 9, Meads Addition was, and was familiar with the surrounding territory, and that there would be very little hazard in the drilling of a well for oil or gas there; that since the improvement of modern equipment and appliances there had been no well to get loose in the Oklahoma City field. (Printed Record, Page 68).

H. H. WEGENER testified he had been a drilling contractor for twelve years and was familiar with the Oklahoma City field and had done a lot of drilling in that field; that he had not had any trouble in bringing in a well in the Oklahoma City field; that he was familiar with block 9, or the "Hog Pen" location, as they called it, and knew it was a dumping ground full of tin cans and refuse unfit for human habitation, and that the drilling of a well at this location would not be hazardous to the surrounding property or people; (Printed Record, Page 74), that he had completed four wells in the Oklahoma City field; that by the use of modern equipment on any of these wells they could not get beyond control. (Printed Record, Page 75).

M. T. SMITH testified that he was a drilling contractor and was drilling a well on block 9, Meads Addition; that he had been drilling contractor for about thirty years and

had drilled oil wells before the Oklahoma City field was ever heard of, and that the two wells he is now drilling would make fourteen he had drilled in the Oklahoma City field; that he was familiar with the bringing in of oil and gas wells, both in the Oklahoma City field and other fields; that he was familiar with the conditions surrounding Block 9, Meads Addition, and that he did not consider the bringing in of a well there or operating of a well there hazardous to surrounding property. (Printed Record, Page 77). That he had never had any trouble with any well he had drilled in the Oklahoma City field; that he used the modern equipment in the bringing in of the wells.

Hudspeth being recalled, testified the probably life of the wells in the Oklahoma City fields was from seven to fifteen years.

The witness Knox L. Garvin testified, in addition to the above statement, that he had made application for a permit to the Board of Adjustment and had complied with all of the requirements of the ordinance, and of the Board, except as to the matter of posting the surety bond required.

He further testified that in the U-7 or drilling zone within the city limits there were approximately twelve to fifteen hundred acres; that of that area probably fifty percent is settled up with residences and some business and industries. (Printed Record, Page 56).

It was further shown by the testimony of this witness that in his offer to post a personal bond, no principal sum of such bond was discussed, nor was a definite bond tendered (Printed Record, Page 54), and that the reason the surety bond required by the ordinance was not posted was because of his inability to meet the requirements of the surety company (Printed Record, Page 59). That the ordinance operated to his detriment because of his inability to qualify so a surety company would execute his bond. (Printed Record, Page 59).

The ordinance referred to further provides:

> "A. It shall be unlawful and an offense for any person, firm or corporation to drill or put down any petroleum or gas well within the corporate limits of the City of Oklahoma City, except within the limits of the U-7 or Oil and Gas District, and unless permit therefor shall have been first obtained. (Printed Record, Page 81).

The trial court granted permanent injunction in favor of defendant, City, on its cross-petition and against the appellants, injoining them from operating or completing the well in question until or unless they first made and executed the surety bond required by the ordinance. The judgment of the trial court was affirmed on appeal by the Supreme Court of Oklahoma. The opinion of affirmance is reported as *Walter H. Gant et al.*, vs. *The City of Oklahoma City*, 15 Pac. (2d) 833. A copy of the opinion is found in the printed record at page 87.

SPECIFICATION OF ASSIGNED ERRORS URGED ON APPEAL

The assignment of errors appear at pages 92 of the printed record. We intend to urge assignments of error one, two three and four which embrace the proposition that the Supreme Court of the State of Oklahoma erred in affirming the judgment of the trial court granting a permanent injunction, said judgment being based on the finding and holding that the provision of the ordinance of the City of Oklahoma City requiring the giving of a $200,000.00 bond signed by a surety company authorized to do business in the State of Oklahoma was and is constitutional and valid, while it is the contention of the appellant that the same is unconstitutional and void, and should have been so declared by that Court.

For convenience the assignments will be argued as one question, as the same presents a question of law, the facts in the case not being in dispute. The question will be argued under the following proposition, to-wit:

PROPOSITION NO. ONE

Section No. 21 of Ordinance No. 3944 of the defendant City of Oklahoma City, Oklahoma, violates Section 1, Article 14, of the Constitution of the United States, Section 2, Article 2, of the Constitution of the State of Oklahoma, and Section 7, Article 2, of the Constitution of the State of Oklahoma, and is, therefore, void.

In 1923, the Legislature of the State of Oklahoma adopted an act which is Chapter 178 of the 1923 Session Laws, which, among other things, reads as follows, to-wit:

> "For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of states and corporate villages is hereby empowered to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot which may be occupied, the size of yards, courts and other open spaces, the density of population and the location and use of buildings, structures and land for trade, industry, residence or other purposes."

Acting under this delegated authority from the State, the city adopted the ordinance in question, Section 21 of which is quoted in full above.

The same requires the giving of a $200,000 surety bond as a condition precedent to the issuance if a permit to develop one's property for oil and gas purposes within the City limits.

Section 1, Article 14 of the Constitution of the United States, among other things, provides:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

Section 2, Article 2 of the Constitution of the State of Oklahoma provides:

"All persons have the inherent right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry."

Section 7, Article 2 of the Constitution of the State of Oklahoma provides:

"No person shall be deprived of life, liberty or property without due process of law."

Conceding, for the sake of this argument, that the city was authorized by the Act of the Legislature above mentioned, to adopt ordinances having for their purposes the accomplishment of the objects set out in the Act of the Legislature, then it is our contention that such ordinances, rules or regulations, in order to be valid and constitutional, would have to be reasonable, and that the question of their reasonableness or unreasonableness is for the courts to determine.

Upon the right of the courts to pass upon the reasonableness or unreasonableness of the ordinances adopted by the city in the exercise of its police power, we desire to make the following observations, to-wit:

The Supreme Court of the United States, in the case of *Dobbins* v. *Los Angeles*, 25 Sup. Ct. Rep. 18, 195 U. S. 223, 47 L. ed. 119, an opinion by Mr. Justice Day, among other things, said:

> "But notwithstanding this general rule of law, it is now thoroughly well settled by decisions of this Court that municipal ordinances, and by-laws and even legislative enactments undertaking to regulate useful business enterprise, are subject to investigation in the courts with a view to determining whether the law or ordinance is a useful exercise of the police power, or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with the constitutional rights to carry on lawful business, to make contracts, or to use and enjoy property."

In the case of *Lawton* v. *Steele*, 152 U. S. 133-137, 38 L. ed. 385-388, 14 Sup. Ct. Rep. 499-501, Mr. Justice Brown, speaking for the Court, among other things, said:

> "The Legislature may not, under the guise of protecting the business interests, arbitrarily interfere with private business or impose *unusual and unnecessary* restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final nor conclusive, *but is subject to the supervision of the courts.*" (Italics ours.)

The Supreme Court of the State of Oklahoma, in the case of *Walcher* v. *First Presbyterian Church of Norman, Oklahoma*, 76 Okla. 9, 184 Pac. 106, said:

"An ordinance of a regulatory nature in contravention of the natural rights of individuals, must be reasonable; that is, the *court* must be able to see that it will tend to promote the public health, morals, safety or welfare." (Italics ours.)

The Supreme Court of the United States, in the case of *Yick Wo* v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064, said:

"The same principle has been more freely extended to the *quasi* legislative acts of inferior municipal bodies, in respect to which it is an ancient jurisdiction of judicial tribunals to pronounce upon the reasonableness and consequent validity of their by-laws. In respect to these it was the doctrine that every by-law must be reasonable, not inconsistent with the charter of the corporation, nor with any statute of parliament, nor with the general principle of the common law of the land, particularly those having relation to the liberty of the subject, or the rights of private property."

In the case of *Reagan* v. *Trust Co.*, 154 U. S. 362, 397, 399, 410, 412, 14 Sup. Ct. Rep. 1047, the Court, among other things held:

"It is within the power and the duty of courts to inquire whether the body of rates prescribed by a Legislature or Commission is *unjust and unreasonable*, and such as to work a practical destruction to rights of property, and if so found to be, to restrain its operation. (Italics ours.)

"These cases all support the proposition that while it is not the province of courts to enter upon the merely administrative duty of framing a tariff of rates

for carriage, it is within the scope of judicial power and a part of judicial duty, to restrain anything which, in the form of regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new nor strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, organized body or the public as a whole) operates to divest the other of any rights of person or property."

In the case of *Hopkins* v. *Richmond*, 117 Va. 692, 86 S. E. 139, Ann. Cas. 1917D 1114, the Court said:

"Whether a particular ordinance is unreasonable and thus void, is a question for the *Court*, but in determining it the Court will have regard to all the circumstances of the city and the objects sought to be obtained, and the necessity which exists for the ordinance." (Italics ours).

We now pass on to the proposition that any ordinance, rule or regulation adopted by a municipal corporation in exercise of the police power, in order to be valid and constitutional, must be reasonable.

In support of this statement, we desire to make the following observations, to-wit:

19 R. C. L., par. 112, p. 305:

"A municipal ordinance of a regulatory nature in contravention of the natural rights of individuals enacted under general charter powers, is not only required to be constitutional, but it *must be reasonable* as well; that is, the court before which it is brought

must be able to see that it will tend to promote the public health, morals, safety or welfare." (Italics Ours.)

19 R. C. L., par. 113, p. 809, speaking of municipal ordinances, says:

> "If it is manifestly unjust; if it discloses bad faith; if it involves such oppressive or gratuitous interference with the rights of the citizens as can find no justification in the minds of reasonable men, the court might well say that the Legislature never intended to give authority to make such rules; they are unreasonable and *ultra vires*."

The Court of Appeals of Maryland in the case of *City of Baltimore* v. *Radecke*, 49 Md. 217, said:

> "There may be a case in which an ordinance passed under grants of power like those we have cited is so clearly unreasonable, so arbitrary, oppressive or partial as to raise the presumption that the Legislature never intended to confer the power to pass it and to justify the court in interferring and setting it aside as a plain abuse of authority."

The Supreme Court of the State of Oklahoma, in the case of *Walcher et al.*, v. *First Presbyterian Church of Norman*, supra, said:

> "An ordinance of a regulatory nature in contravention of the natural rights of individuals *must be reasonable*, and the court must be able to see that it would tend to promote the public health, morals, safety and welfare." (Italics ours.)

The case of *Dobbins* v. *Los Angeles, supra,* involved a state of facts wherein the plaintiff, Dobbins, was attempting to erect a gas works in territory which was a district devoted almost exclusively to manufacturing purposes, having in its boundary a large amount of vacant and unoccupied land which was and continued to be useless except for the manufacturing establishments; that within said district at said time there was located a soap factory, a wool pulling factory, three wineries, numerous oil wells in operation, an iron foundry, brass factory, and an oil refinery; that immediately east of said location there were railroads and an extensive cannery and immediately north a refinery of the Standard Oil Company. The City of Los Angeles in that case adopted an ordinance prohibiting the erection of said gas works. Plaintiff complained of that ordinance as being unreasonable and unconstitutional. The Supreme Court of the United States, in deciding the Dobbins case, quoted from a California case, *Re Smith,* 143 Cal. 368, 77 Pac. 180, in which the Supreme Court of California, said:

> "But running current with this principle, and to be read with it, is one of equal importance, * * * namely, that when the police power is exerted to regulate a useful business or occupation, the Legislature is not the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizens to pursue any trade, business or vocation, which in itself is recognized as innocent and useful to the community. It is always a judicial question if

> any particular regulation of such right is a valid exercise of police power, though the authority of the courts to declare such regulation invalid will be exercised with the utmost caution, and only when it is clear that the ordinance or law declared void passes the limits of the police power, and infringes on rights guaranteed by the Constitution."

The Supreme Court of the United States in this case reversed the opinion of the Supreme Court of California and held that the city ordinance of the City of Los Angeles was void because of its unreasonableness, or at least held that the bill of complaint stated a cause of action, holding in that case that the city did not have a right, under the guise of enforcing police regulations, to arbitrarily interfere with the constitutional rights of a party to carry on a lawful business, to make contracts or use and enjoy property.

In the case of *Holden* v. *Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, Mr. Justice Brown, speaking for the Court, said:

> "The question in each case is whether the Legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination or the oppression or spoliation of a particular class."

In the case of *Ex parte Throop*, 145 Pac. 1029, the Supreme Court of California held:

> "A city ordinance prohibiting the maintenance of certain factories, including stone crushers, within a large district of the city which was sparsely inhab-

ited and which contained 500 acres which were unimproved and practically uninhabited, but permitted them within a much smaller district which was densely inhabited, though by the poor classes, is unreasonable and void.

"The business of producing crushed stone for concrete work cannot be arbitrarily suppressed for interfered with by a city unless it is a nuisance or injurious to the health, comfort, safety or welfare of the inhabitants."

This was a case where one Throop was arrested for operating a stone crusher in violation of the provisions of a city ordinance. The plant that he was operating was in the Arroyo Seco, which was a wash. For a distance of about a half a mile on the east side of the wash the area consisted almost entirely of vacant and unimproved land. There were only four dwellings within a radius of 200 yards of the crusher. The area in the neighborhood of the stone crusher was made up of a large area of rugged, rough land and bushy wash, cut off from the rest of the neighborhood by high bluffs ranging from fifty to one hundred feet high. In the neighborhood and closer to the populous part of the city there were several railroads in operation. The land had scarcely any value other than that due to the building material found thereon. The City of South Pasadena attempted by city ordinance to prohibit the operation of the stone crusher. The Supreme Court of California, when deciding that case, said:

"The City of South Pasadena, in the exercise of the police power vested in it by our State Constitution, has the undoubted right to regulate the business of operating a stone crusher within the city limits, but such ordinance must be reasonable and must be for the purpose of protecting the public health, comfort, safety or welfare."

The Court further in that case said:

"In the case now under consideration, it is plainly manifest that the attempted regulation of the business conducted by the petitioner *has no relation to the ends for which the police power exists, namely, to protect the public health, comfort, safety or welfare.*" (Italics ours.)

The Supreme Court held that this ordinance was void as being unreasonable.

The Supreme Court of the United States, in the case of *Pennsylvania Coal Co.* v. *Mahon et al.*, 43 Sup. Ct. Rep. 158, 260 U. S. 393, 67 L. ed. 322, among other things, said:

"This is the case of a single private house. No doubt there is a public interest even in this, as there is in every purchase and sale and in all that happens within the commonwealth. Some existing rights may be modified even in such a case.

"But usually in ordinary private affairs the public interest does not warrant much of this kind of interference. A source of damage to such a house is not a public nuisance *even if similar damage is inflicted on others in different places.* The damage is not common or public." (Italics ours.)

The same Court in the same opinion said:

> "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

In the case of *Nectow* v. *City of Cambridge et al.*, 277 U. S. 183, 72 L. ed. 842, 48 Sup. Ct. Rep. 447, Mr. Justice Sutherland said:

> "Governmental power to interfere by zoning regulation in general rights of landowner by restricting character of its use must bear a substantial relation to public health, safety, morals or general welfare.
>
> "Municipal zoning ordinance, including within residential district land not indispensable to general plan and adjacent to unrestricted property without any necessity for inclusion therein by reason of health, safety, convenience and general welfare of inhabitants of part of city affected, held in violation of the Constitution of the United States, Fourteenth Amendment."

The Court in the same case said:

> "An owner of property which borders on factories with the railroad tracks near is unconstitutionally deprived of his property without due process of law by zoning it into the residential class for which it cannot be profitably used where such action will not promote the health, safety, convenience and general welfare of the inhabitants of the part of the city affected."

In the case of *Abbey Land & Implement Co.* v. *San Mateo County*, 139 Pac. 1068, the Supreme Court of California said:

"In determining the advisability or necessity of a proposed police measure, the legislative body is presumed to take into consideration the circumstances and conditions under which the thing to be regulated or forbidden exists or may occur. The courts in considering the question whether or not such measure is reasonable in its application and effect, may also look to these general circumstances and conditions, so far as they are matters of judicial knowledge, and so far as they may be admitted or shown by undisputed, clear and satisfactory evidence in the record of the particular case. There are many instances in our own jurisprudence where this has been done."

In the case of *Continental Oil Co.* v. *City of Twin Falls et al.*, 286 Pac. 353, the Supreme Court of Idaho said:

"Ordinance prohibiting construction of a drive-in filling station within 500 feet of school grounds held clearly unreasonable, and therefore invalid, as applied to plaintiff's block, where such property by reason of size, shape and heavy special assessment was too valuable for residence purposes, and there was no increased fire hazard nor danger form explosion nor offensive odor within distance school was located from the filling station, and noise incident to operation of cars would not interfere with school work, and traffic on sidewalk was not of sufficient volume to render operation of service station dangerous to life, the ordinance violated the guaranties of the Constitution of the United States, Amendment 14, and State Constitution, Article 1, Section 13."

The Supreme Court of the State of Ohio in the case of *Youngstown* v. *Kahn*, 112 Ohio St. 654, 148 N. E. 842, 43 A. L. R. 662, said:

"A provision in an ordinance establishing a fraction only of the territory of a municipality into a district and providing that no building which is intended to be used as a dwelling shall be erected within the district except as a single or two family dwelling in a case where the record shows that the district is a most healthful part of the municipality in which to erect an apartment house, and that the public health, morals and safety of the district, and of the entire municipality will not be impaired by the erection of such an apartment house, constitutes a taking of property without due process of law and the taking of private property for public use without compensation and is invalid."

In *Re Gibbon*, 47 Pac. 1074, the Supreme Court of Oklahoma, among other things, said:

"To determine the validity of the ordinance in question in this case, we must first determine whether there has been a grant or delegation of authority by the Legislature of the Territory to the City of Oklahoma City to pass such ordinance. The City of Oklahoma City was not created by special charter, but is organized as a city of the first class under the provisions of general law of the territory, being Chapter 14 of the Statutes of 1893. Mr. Dillon, in his work on Municipal Corporations (1 Mun. Corp., 3rd Ed., p. 115), says: 'It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no other: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable, *any fair, reasonable doubt concerning the existence of power is resolved by the court against the corporations and the power is denied.*" (Italics ours.)

In the case of *People* v. *Chicago*, 49 L. R. A. (N. S.) 438, the Court, among other things, said:

> "Statutes granting powers to municipal corporations are strictly construed and any fair and reasonable doubt as to the existence of a power must be resolved against the municipality."

In the case of *Village of Terrace Park* v. *Errett et al.*, 12 Fed. (2nd ed.) 240, the Circuit Court of Appeals of the Sixth Circuit, speaking through Circuit Judge Donahue, said:

> "Village, though duly authorized to adopt zoning ordinance, cannot exercise that power in such arbitrary and unreasonable manner that ordinance will be unconstitutional *in its operation and effect.* (Italics ours.)
>
> "Zoning ordinance of Village of Terrace Park adopted under authority of Act, Ohio, April 17, 1923 (110 Ohio Laws, p. 275), in its application to property within residence district sought to be used as a gravel pit, held unreasonable and violative of the Constitution of Ohio, Article 1, pars. 1 and 19, and Constitution of United States, Amend. 14, and par. 1."

In this case Russell Errett, a citizen of Florida, owned block 23 in the Village of Terrace Park, Ohio, which village is located about thirteen miles from the business center of Cincinnati. This particular block contained 8.8 acres of unimproved farm land that had never been subdivided into town lots.

In June, 1923, the council of the Village of Terrace Park, purporting to act under certain sections of the Ohio

statutes, established a village planning commission, which began its deliberations and certified to the village council a proposed zoning ordinance and map dividing the village into two districts, residential and business. The business district was established in and about the stores and shops in the northeastern portion of the village, and all of the rest of the territory within the village was designated as the residential district. Errett's property was in that portion of the village designated as a residential district. In 1924, Errett, who had been charged with offending against this ordinance, filed a bill in equity against the city to enjoin the enforcement of the ordinance insofar as it applied to block 23. He alleged that the ordinance was illegal and void and in violation of both the State and Federal Constitutions; that the ordinance was unreasonable and arbitrary and unconstitutional in its operation and effect.

The village filed its answer, denying the allegations of the bill and further alleged that the ordinance was not unreasonable or arbitrary, and that the adoption of the ordinance was in conformity with the provisions of the Constitution and laws of the State of Ohio. The trial court found, on the issues joined, for the plaintiff, and enjoined the Village of Terrace Park from enforcing the ordinance against the plaintiff or his successor in title. From this decree the village appealed.

The Circuit Court of Appeals held that in the disposition of the case it became unnecessary to determine the constitutionality of the Ohio statute conferring power upon the municipality to appoint a planning commission and to pass zoning ordinances, or the constitutional power of the village to pass such ordinance regardless of the authority conferred by the statute.

The Court held that for the purpose of deciding the case, it might be conceded that the village, in the exercise of its police power, either delegated to it by the statute or vested in it by the Constitution of Ohio, had the authority to pass a zoning ordinance reasonably necessary for the preservation of the public health, morals or safety, where such necessity appeared either from existing conditions or reasonable anticipation of future growth and development. However, the Court held that it did not follow that the village could exercise that power in such an arbitrary and unreasonable manner that the ordinance would be unconstitutional in its operation and effect, holding that if such power was so exercised the owners of the property whose constitutional rights were invaded would be entitled to the same relief as if the statute conferring the power were unconstitutional. The Court held that the owner of the fee simple estate in land had the same vested interest and property rights in the minerals in or underlying the land as the owner who has executed a deed to the surface,

reserving the mineral rights, holding that in either case the same rule applied in determining whether an ordinance is regulatory in its nature or amounts to the taking of private property without compensation.

The Court, in that opinion, among other things, said:

"There is also a substantial difference between an ordinance prohibiting manufacturing or commercial business in a residential district that may be conducted in another locality with equal profit and advantage and an ordinance that wholly deprives the owner of land of its valuable mineral contents. This difference was recognized by the Supreme Court in *Hadacheck* v. *Los Angeles*, 239 U. S. 394, 36 Sup. Ct. Rep. 143, 60 L. ed. 348, in which case it was held that 'while an ordinance prohibiting the manufacturing of bricks within a specified section of a municipality may be a constitutional exercise of the police power, *quaere* whether prohibiting of digging the clay and moving it from that section would not amount to an unconstitutional deprivation of property without due process of law.' In this connection the court cited with approval Ex parte Kelsoe, 147 Cal. 609, 82 Pac. 241, 2 L. R. A. (N. S.) 796, 109 Am. St. Rep. 178, wherein the court declared invalid an ordinance absolutely prohibiting the maintenance or operation of a rock or stone quarry within a certain portion of the City of San Francisco upon the theory that such ordinance absolutely deprived the owners of real property of valuable rights incident to their ownership, but further held that operations of such stone quarry could be regulated. The court also cited with approval Reinman v. Little Rock, 237 U. S. 171, 35 Sup. Ct. Rep. 511, 59 L. ed. 900, in which case the operation of a livery stable was lawfully prohibited because that particular business was not affixed to or dependent upon its locality and could be conducted elsewhere.

"Evidence was offered by the village tending to prove that the dust and noise from the operation of that plant would not only be disturbing and annoying to its citizens, but a menace to the public health. Upon these questions there is a conflict of evidence, but there is no conflict of evidence tending to prove the distance the plant is to be located from the residences and schools in Terrace Park, or that this plant is to be operated by electricity and housed as far as possible, to prevent the escape of dust and subdue the noise of its operation. Upon a full consideration of all of this evidence we have reached the conclusion that the health of the citizens of Terrace Park will not be imperiled by the operation of this plant at such a remote distance from their homes, and that the possibilities of discomfort and annoyance is more imaginary than real and in no wise to be compared with the inconvenience or annoyance of the noise and soot of the trains that pass through this village every 30 minutes.

"For the reasons stated, this ordinance, if enforced in the terms in which it is written, or to any extent beyond the limitations imposed by the decree of the District Court would be arbitrary, unreasonable and unconstitutional in *its operation and effect*, and not merely regulatory in character, but a taking of private property without compensation." (Italics ours.)

In other words, the Circuit Court of Appeals held that the village zoning ordinance, although it might have been enacted pursuant to a power conferred upon the city and although valid in all respects, was inoperative as to the plaintiff's particular property because of the location of the property and because the enforcement thereof, as applied to the plaintiff's particular property was unreason-

able and the effect of the enforcement thereof and its operation and effect would have been to have deprived the plaintiff of valuable property rights.

In the case of *Re John Kelso*, 147 Cal. 609, 82 Pac. 241, the Supreme Court of the State of California, in passing upon an ordinance adopted by the City of San Francisco prohibiting the operation of rock or stone quarries within certain portions of the city, said:

> "The effect of the ordinance absolutely prohibiting the maintenance or operation of a rock or stone quarry within certain designated limits of the City and County of San Francisco is to absolutely deprive the owners of real property within such limits of a valuable right incident to their ownership, viz., the right to extract therefrom such rock and stone as they may find it to their advantage to dispose of. While the use to which a man may put his property may be restricted or regulated by the State, in the exercise of its police power, so far as may be necessary to protect others from injury from such use, it is, of course, elementary, that the enjoyment of one's property cannot be interfered with or limited arbitrarily. As is said in Tiedeman's Limitations of Police Power, the next thing to depriving a man of his property is to circumscribe him in its use. A limitation of the use *pro tanto* deprives him of the enjoyment thereof, and any arbitrary action in this regard is a taking of private property without due process of law. While in the exercise of its police power the State may limit or regulate the use, any such limitation or regulation must find its justification in the necessity for the protection of the legal rights of others. If it does not, it is an unwarrantable invasion of property rights, against which the courts will protect."

In the case of *Pacific Palisades Association* v. *City of Huntington Beach et al.*, 237 Pac. 538, the Supreme Court of California, among other things, said:

> "Although use of property may be restricted or regulated, in exercise of police power, so far as necessary to protect others from injury from such use, enjoyment of the property cannot be interfered with or limited arbitrarily.
>
> "Although municipalities may by zoning ordinances regulate use of property within delineated areas and districts as reasonably necessary to health, safety, morals and general welfare, zoning ordinances must not impose an unwarranted and arbitrary interference on right to carry on lawful business, make contracts or use and enjoy property, under guise of police regulations; reasonableness being subject to investigation in courts."

The same Court in the same case in the body of the opinion says:

> "The business of boring for and producing oil is a lawful enterprise."

This case of *Pacific Palisades Association* v. *City of Huntington Beach* is a case wherein the City of Huntington Beach was attempting to interfere with the plaintiff in error in the drilling of an oil well within the city limits under authority of certain city ordinances. The plaintiff brought an action seeking to enjoin the city from interfering with the plaintiff in the erection of derricks, installing machinery and drilling oil wells on its own lands within

the city limits. The plaintiff in this case had acquired certain property rights and had obligated itself to drill certain oil wells prior to the time of the adoption of the city ordinance. Plaintiff alleged that its property was proven oil land, and that within close proximity there were now producing probably twenty wells; that the area within close proximity to said property was sparsely settled and a large part of it was vacant and unoccupied by residences, there not being more than twenty houses in that section of the city. The court held that an attempt to prohibit the extraction of oil from that ground was not a proper exercise of police power.

In the case of the *City of North Muskegon* v. *Miller*, 227 N. W. 743, the facts were about as follows:

In 1925 the city adopted a zoning ordinance by virtue of which the property on which it was sought to drill the oil well was restricted in its use to single family dwellings, churches, schools, libraries, farming and truck gardening and private clubs.

In 1928, shortly after oil had been discovered within the corporate limits of plaintiff, an ordinance was passed making it unlawful to drill wells for the purpose of obtaining oil and gas without first securing a permit from the council of plaintiff. Notwithstanding these two ordinances, defendant Miller, as lessee of the property, in the

year 1928, together with the defendant Voorhees, the oil drilling contractor, after two unsuccessful efforts to secure a permit from the city, proceeded to drill an oil well without a permit on the property described herein.

The city instituted an action to restrain the defendants from proceeding with their drilling operations and after a hearing a final decree was entered permanently enjoining defendants from drilling the well. From this decree defendants appealed, claiming that the zoning ordinance and the oil drilling ordinance were not properly adopted, and that the zoning ordinance was unreasonable and unwarranted by the police power; and that it violated the Constitution of the State of Michigan, and the Fourteenth Amendment to the United States Constitution. The property upon which the defendants were attempting to drill the well was a part of the lowlands. The well was being sunk at a point variously estimated from 300 to 600 feet from Ruddiman avenue, 550 feet from the bluff and 150 feet from the water. Adjacent to the lot upon which the well was being drilled to the east was the city dump for refuse and garbage, which at various times gave off a very unpleasant odor. About 220 feet west of the oil well was a water well which furnished about half of the water supply of the city. Bordering the land on the west was a clump of trees, known as Bigelow's Grove, which partially shielded the proposed oil well from the view of a few new

houses erected about two blocks to the west. A little less than a mile west of the proposed oil well was the most active of the better residential subdivisions. At least a portion of the lowlands is marsh, practically a barren waste, uncultivated and unimproved. The land along the bluff on Ruddiman Avenue, which was not to exceed 809 feet from the well, was fairly built up with substantial residences. Along the lowlands, however, for a distance of a mile and a half east there are only thirteen residences, only one of which is used as a permanent residence. All the witnesses testified that the lowlands was useless for residential purposes.

The Supreme Court of Michigan, in passing upon this case, held the zoning ordinance adopted by the City of North Muskegon, insofar as it applied to the particular property involved in that action was invalid, being an unreasonable and unwarrantable interference with the rights of the defendants. The Court said :

> "It will be readily seen that the property in question is almost worthless if its use is to be restricted as provided in the zoning ordinance. The courts have particularly stressed the importance of not destroying or withholding the right to secure oil, gravel or mineral from one's property, through zoning ordinances, unless some very serious consequences will follow therefrom. The effect of the zoning ordinance in the cause at issue amounts almost to a confiscation of the property. The legality of a zoning ordinance, when reasonable, has been long recognized by our courts.

Although the question is comparatively new in Michigan, its legality has been upheld a number of times. Zoning ordinances have been upheld by the United States Supreme Court in many instances, the leading case being that of *Village of Euclid* v. *Ambler Realty* Co., 272 U. S. 365, 47 Sup. Ct. 114, 71 L. ed. 303, 54 A. L. R. 1016. It is, however, necessary that a zoning ordinance be reasonable, and the reasonableness of it becomes the test of its legality. Any ordinance to be legal must be reasonable.

"A careful inspection of a map of the restricted property involved in the present case convinces us that the zoning ordinance is unreasonable *as far as this particular piece of property is concerned. The City of Muskegon itself has shown its lack of regard for the property by using a parcel almost adjacent thereto as a dumping ground for garbage and refuse.* The property consists of marshy lowlands, which are unfit for the purpose to which they are limited by the zoning ordinance. We only pass upon the question of the reasonableness of the zoning ordinance as applied *to the particular section of the city where this property is located.* We find that the zoning ordinance *as applied to the property in this case is unreasonable and confiscatory, and therefore illegal.*" (Italics ours.)

In order that a municipal regulation may be sustained as an exercise of the police power the regulation must have for its object the prevention of some offense or manifest evil, or the preservation of the public health, safety, morals or general welfare. The exercise of the police power must have a substantial basis. The power cannot be made a mere pretext for regulations that do not fall within it. There must be some clear, real and substantial con-

nection between the assumed purposes of the regulation and the active provisions thereof, and the provision must in *some plain, appreciable and appropriate manner tend toward the accomplishment of the object for which the power is exercised.*

Would the giving of a $200,000.00 bond by the plaintiffs in this case, as required by the city, in any plain, appreciable and appropriate manner tend towards the promotion of either of the objects to secure which the city may exercise its police power viz., the preservation of public health, safety, morals or general welfare? We are unable to see how such a bond would preserve the health, safety, morals or general welfare of the community as a whole. If the drilling of the well itself constitutes a menace to the health, comfort, morals, safety or general welfare of the people, the drilling of the well, after the bond has been made, would be no less a menace than it was before the bond was given. The only thing the bond would do would be to protect the individual citizens of the city against any damage that either of them might incur by reason of the drilling of the well by the plaintiffs in error. In other words, the ordinance attempts, by police regulation, to afford the basis of a civil action between its citizens. A municipal corporation has no power to create a civil liability between individuals. The Legislature cannot delegate to a city the power to enact a law that will

afford the basis of an action between citizens *inter sese*. The power to regulate the actions of citizens between each other that may be exercised by the municipality arises entirely out of police power and the right of civil action cannot arise out of a mere police regulation. No where does the law confer upon the city the right to enact an ordinance that will or should afford the basis of a civil action between citizens *inter sese* for the violation of such regulation. This is one of the things the city is seeking to do in requiring the giving of the $200,000.00 bond.

In the case of *Harrigan & Reed Company* v. *Frank Burton et al.*, 224 Mich. 564, 195 N. W. 60, 33 A. L. R. 142, the City of Detroit adopted an ordinance regulating the business of selling and installing heating systems and apparatus in dwellings in the City of Detroit. The first section of the ordinance provided that no person, firm or corporation shall install, or cause to be installed, any heating or warming system or apparatus in dwellings in the City of Detroit without a contractor's license from the department of buildings and safety engineering, and filing a bond in the sum of $1,000.00 to indemnify purchasers of heating and warming systems or apparatus installed in dwellings in Detroit under this ordinance, if such systems or apparatus are found not to comply with the provisions of this ordinance and rules formulated under paragraph 8. There

were quite a number of additional sections to this ordinance. The plaintiff in error attacked the ordinance on the ground that it was void because the city had no right in the exercise of its police power to require the giving of a bond to indemnify purchasers from the plaintiff. The Court, in that case, among other things, said:

> "Unquestionably the municipality, under its general police power, has authority to adopt proper and reasonable ordinances having for their purpose prevention of fires and protection of life and property from conflagrations, as, within reasonable and legal limits, its legislative body may deem a public necessity; but municipal ordinances, though ostensibly enacted as public regulations, which are so framed as to control or regulate a common and useful private business or occupation in life, are subject to review and investigation in the courts, to determine their validity by the test of whether, under the guise of police regulation, there is an arbitrary, unreasonable or unwarranted interference with the constitutional rights of the private citizen to pursue a lawful business or calling, and to make contracts with others in relation thereto (citing cases).
>
> "The business of installing heating and warming systems or apparatus in dwellings in the city of Detroit and elsewhere, and to make contracts for so doing, is in itself a harmless, useful and necessary industrial pursuit. By this ordinance no person, firm or corporation can engage in that business in Detroit without a contractor's license, secured from the department of building and safety engineering and filing a bond of $1,000.00 to indemnify purchasers from it, or them, of the heating system or apparatus to be installed in dwellings in Detroit. Compelling a bond from the contractor to protect or indemnify the pri-

vate citizen who chooses to make a legitimate contract with him for the purchase of a heating system or warming apparatus, and installing it in his private dwelling, suggests a measure of paternalism in the ordinary business relations of private parties beyond the normal scope of the police power of a municipality, as intimated in People ex rel. Valentine v. Berrien Circuit Judge (People ex rel. Valentine v. Coolidge), 124 Mich. 664, 50 L. R. A. 493, 83 Am. St. Rep. 352, 83 N. W. 594. It was there said that even the legislature of this state is 'not empowered by the Constitution to regulate contracts between its citizens, who are engaged in legitimate commercial business, or to require any class of persons to pay a fee for the right to carry on business, or to give a bond to perform their contracts which other parties may choose to make with them'."

The requirement of the city for the $200,000.00 bond in the instant case amounts to a prohibition instead of a regulation prohibiting the plaintiffs in this action from removing minerals from lands. It amounts to a prohibition and not a regulation in the following respect: It is conditioned that said bond shall be made by a surety company authorized to transact business within the State of Oklahoma. The record discloses that surety companies authorized to transact business in this State, before they will make such a bond, require applicants for the bond to make a financial statement showing a net worth of at least a million dollars, or to deposit with the surety companies collateral securities of the value of approximately $250,000.00. These securities must be such as are readily

convertible into cash. Appellants in this case testified that they were unable to comply with the requirements of the surety companies, and therefore unable to furnish such a bond. Even had the plaintiffs been able to put up with the surety company collateral security, then it would still be optional with the surety company as to whether or not they would execute such a bond for the plaintiffs. In other words, requiring such a bond places the matter entirely within the hands of surety companies authorized to do business in this State to say whether or not any particular person, firm or corporation would be entitled to drill a well within the corporate limits of Oklahoma City. Had the plaintiffs been able to put up a million dollars worth of security with the surety company, there is no way that they could have compelled the surety company to execute such a bond as surety.

The record in this case discloses that the well is being drilled upon a piece of property that has been used for a period of more than twenty years as a city dump garbage and refuse; that there are no places of habitation within half a mile of it; that surrounding it there is nothing but vacant, unimproved waste land. The condition of the property with reference to its location is very similar to the property involved in the case of *City of North Muskegon* v. *Miller et al.*, supra, and the case of *Pacific Palisades Association* v. *Huntington Beach*, supra. In each of which

cases the courts held that the city was without power to prohibit the drilling of oil wells.

The requirement of the city ordinance relative to the giving of the bond suggests a measure of paternalism in the ordinary business relations of private parties beyond the normal scope of the police power of the municipality as intimated in the case of *Harrgan & Reid Co.* v. *Burton et al., supra.*

The case of *Geo. Bolln Company* v. *North Platt Valley Irrigation Co.*, 121 Pac. 22, involved the constitutionality of a statute of the State of Wyoming. Said statute provided that whenever any ditch or canal company, or other owner, shall contract for the construction of a ditch, canal or reservoir, such company shall take from the contractor a bond conditioned for the payment of persons who supply such contractor with labor, farm products or goods of any kind for all just debts incurred in carrying on such work, and on failure to take such bond, such company or owner shall be liable to the full extent for all debts of such contractor or sub-contractor. It also involved the constitutionality of that portion of the same act which required that the bond provided for should be taken in some guaranty or surety company authorized to do business within the State. In other words, the State of Wyoming had provided that before a ditch or canal company or other own-

er, could contract for the construction of a ditch or canal, it should execute a bond conditioned as provided by said statute, and that said bond should be executed by some guaranty or surety company authorized to do business within the State as surety. The Supreme Court of the State of Wyoming in that case held that this provision of the statute requiring said bond to be executed by some guaranty or surety company authorized to do business in the State, violated both the State Constitution and the Fourteenth Amendment to the United States Constitution. The Court, in that case, said:

> "The only remaining question to be considered is that the bond required by the statute must be 'in some guaranty or surety company authorized to do business in this State.' Prior to the adoption of this statute and the similar one applying to railroad companies passed at the same session of the Legislature, all bonds required by law so far as we have been able to discover, were permitted to be given with either personal or surety company security; and if personal security is sufficient for public officers, executors, administrators, etc., and in court proceedings, why not in this class of bonds? As was said by the Supreme Court of Ohio in the case of State v. Robbins, 71 Ohio St. 273-291, 73 N. E. 470 (69 L. R. A. 427, 2 Ann. Cas. 485): 'It is very plain that the surety companies may be greatly benefited by this legislation, but an adequate corresponding benefit or protection to the general public, such as would justify such a radical and drastic limitation upon individual rights is not apparent.' The Ohio statute considered in that case requiring official bonds (with certain exceptions) and administrators' bonds above $2,000.00 to be surety company bonds, un-

less an affidavit was filed that application had been made to such company and refused, was held to be unconstitutional. The statute we are considering *places it within the power of the half dozen surety companies authorized to do business in this State to prevent* any ditch or canal company or other owner from letting a contract for the construction of any ditch, canal or reservoir, except under the penalty of becoming personally liable for the unlimited debts of others for things which have not gone into the work, and due to persons with whom the owner has no contractual relations. Or, if they become surety on such bond, they may charge what they please therefor. Such a requirement, in our opinion, is not only an unwarranted restriction upon the liberty to contract, but a denial of the equal protection of the laws; and in so far as the statute *requires a surety or guaranty bond,* and creates a personal liability for other things than labor and materials which actually go into the work and thereby enhance the value of the property, it must be held to be unconstitutional and void." (Italics ours.)

An Act of the General Assembly of Pennsylvania gave to cities in that state the right to regulate transportation of passengers and property by motor vehicles not operated on tracks. Under this statute the City of Wilkes-Barrie passed an ordinance regulating the running of a jitney, and requiring the owners thereof to furnish and keep in full force and effect at all times either a bond with a responsible surety company or association authorized to do business under the laws of that state in the sum of $2500.00 conditioned to pay all loss or damage that might result to any person from the negligent or reckless opera-

tion of such jitney. Action was commenced to enjoin the City of Wilkes-Barrie from the enforcement of this ordinance. At the trial of that case the evidence disclosed that several surety companies refused to insure or bond jitneys under this Ordinance, and that others would do so providing that cash or collateral to the amount thereof was furnished by the insured. One company apparently was willing to write such liability. In the opinion the Court said:

> "In the present case bond required is restricted to one furnished by a surety company while the evidence shows that it is difficult to procure such a bond from a surety company. Under the circumstances we think the exclusion of personal sureties is not justifiable or reasonable. A municipality is entitled to require good and sufficient security, but beyond that it should not go. The terms of the ordinance in this respect would forbid the deposit of cash or a certified check or municipal bonds as surety by the applicant for a permit, or the acceptance as surety upon his bond of individual free-holders of unquestioned financial responsibility. We know of no other instance in which, where security is required by law to be given, an attempt has been made to confine such security to surety companies to the exclusion of solvent and responsible personal sureties."
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> *Jitney Bus Association* v. *Wilkes-Barrie*, 256 Pa. 462, 100 Atl. 954.

These operations were with respect to the use of the public streets, while in the case at bar the same applied only to private property.

A very recent and instructive case is that of *State of Washington ex rel., Seattle Trust Company* v. *Roberge*, 278 U. S. 116, 73 L. Ed. 210. The court there held:

> "Zoning ordinances must find their justification in the police power exerted in the interest of the public.
>
> "Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities.
>
> "The right to devote real estate to any legitimate use is property within the protection of the Constitution.
>
> "A provision of a zoning ordinance making the right to maintain a home for aged persons within a particular district depend upon consent of the owners of two-thirds of the property within 400 feet of the proposed building violates the due process clause of the Federal Constitution."

The principal announced in this case is applicable to the case at bar. It was held there that it was an unconstitutional taking to require the consent of owners within 400 feet of the property to be used. This consent was necessary under the ordinance before the owner could use his property for the purpose specified in the ordinance. The subject was one within the police power for zoning purposes and yet it was held unconstitutional because it required the consent of third parties, to-wit: the owners of property within 400 feet of the property affected by the ordinance. Applying that principle to the ordinance now

under consideration, we find that no well can be drilled without posting a $200,000.00 bond executed by a paid surety company, and that, under the undisputed evidence, and as a matter of right such sureties must give their consent, before they sign such a bond and that there is no way anyone can force their consent. This being true, this provision of the ordinance is clearly void under the decision just cited. The court in the opinion, says:

> "The right of the trustee to devote its land to any legitimate use is property within the protection of the Constitution. The facts disclosed by the record make it clear that the exclusion of the new home from the first district is not indispensable to the general zoning plan. And there is no legislative determination that the proposed building and use would be inconsistent with public health, safety morals or general welfare. The enactment itself plainly implies the contrary. The grant of permission for such building and use, although purporting to be subject to such consents, shows that the legislative body found that the construction and maintenance of the new home was in harmony with the public interest and with the general scope and plan of the zoning ordinance. The section purports to give the owners of less than one-half the land within 400 feet of the proposed building authority—uncontrolled by any standard or rule prescribed by legislative action—to prevent the trustee from using its land for the proposed home. The superintendent is bound by the decision or inaction of such owners. There is no provision for review under the ordinance; their failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily, and may subject the trustee to their will or caprice. Yick Wo v. Hopkins, 118 U. S. 356, 368, 30 L. Ed. 220, 225,

226, 6 Sup. Ct. Rep. 1064. The delegation of power so attempted is repugnant to the due process clause of the 14th Amendment. Eubank v. Richmond, 226 U. S. 137, 143, 57 L. Ed. 156, 158, 42 L. R. A. (N. S.) 1123, 33 Sup. Ct. Rep. 76, Ann. Cas. 1914B, 192; Browning v. Hooper, 269 U. S. 396, 70 L. Ed. 330, 46 Sup. Ct. Rep. 141."

Now applying the two principles there announced to the ordinance involved in the case at bar: A. The requirement of the bond has no perceptible relation to the general or public welfare because it aids only the individual who might claim damages. It does not make the operations any safer. B. The major corporations are the only ones that can qualify by giving the $200,000.00 surety bond. It therefore creates a monopoly in their favor to drill in the corporate limits. While under the evidence Gant & Garvin and A. D. Hudspeth, plaintiffs in error, are perfectly competent to develop for oil and gas and are perfectly solvent, while there are many other persons just as competent and solvent, yet these comparatively small concerns cannot drill in the city limits for the reason they do not have it within their power to make the surety bond. Thus a monopoly is created in favor of the major oil corporations, innocent enough on the face of it, but existent in fact in the actual operation and enforcement of the ordinance. In other words, there is no way to force a surety company to sign such a bond, for all persons in like situation while, under the evidence they will make such bonds for some companies without question.

May we suggest in conclusion that the appellants are asking relief only from the one provision of the City Ordinance which (a) is not within police power and is unreasonable, and which (b) prevents the development of appellant's property because they cannot make a bond the measurable standard of which lies within the will or caprice of another to give or withhold. This renders them subject to the will of another, rather than to a given standard of conduct with which all careful and solvent operators can comply, as guaranteed by the constitution of the United States. All other and reasonable provisions of the ordinance appellants have cheerfully complied with. The provision complained of, no person, firm or corporation can comply with without the consent of a third person, over whom neither the owner of the property or the courts have any control.

WHEREFORE, it is respectfully submitted that the judgment of the Supreme Court of Oklahoma be reversed with proper directions and for full relief.

Respectfully Submitted.

JAMES S. TWYFORD,
SOLON W. SMITH,
J. H. EVEREST,
Oklahoma City.

ALLEN K. SWANN,
Tulsa, Oklahoma.

R. B. BROWN,
C. D. CUND,
Attorneys for Appellants.